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No. A-510

In the Supreme Court of the United States

OCTOBER TERM, 1980

MARIE D. NESBITT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANKLIN J. FLOCKS
Attorney at Law
260 Sheridan Avenue, Suite 414
Palo Alto, California 94306

Telephone: (415) 326-6625

Attorney for Petitioner

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No. A-510

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MARIE D. NESBITT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.[1]

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, MARIE D. NESBITT, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 26, 1980.

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1. The names of all of the parties respondent to this proceeding are: United States of America, Safeco Title Insurance Company, a California corporation, the City and County of San Francisco, L.T. Goldmeyer dba Union Credit Company, and the Franchise Tax Board, an agency of the State of California.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, pp. 1A-3A) is reported at 622 F.2d 433. The opinion of the district court (App. B, infra, pp. 4A-34A) is reported at 445 F.Supp. 824 and 78-1 U.S.T.C. ¶ 9239.

JURISDICTION

The judgment of the Court of Appeal (App. C., infra, p. 35A-36A) was entered on June 26, 1980. A timely Petition for Rehearing in Banc was filed on July 10, 1980 and was rejected on October 2, 1980 (App. D, infra, pp. 37A-38A). On December 15, 1980, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including January 23, 1981. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether in a tax case, the

Federal Tax Lien Act [26 U.S.C. §6323(a); (I.R.C. of 1939 § 3672)] impliedly limits the effect of the Federal Insolvency-Priority Statute [31 U.S.C. § 191 (Rev. Stat. § 3466)] so that creditors of a taxpayer who are expressly protected from claims of the United States under the terms of the Federal Tax Lien Act are also protected from claims of the United States under the Federal Insolvency-Priority Statute.[2]

2. Whether there is an implied exception from the effect of the Federal Insolvency-Priority Statute [31 U.S.C. § 191 (Rev.Stat. § 3466)] for a creditor with a fully perfected choate judgment lien on real property, even if the Federal Tax Lien Act [26 U.S.C. § 6323(a) (I.R.C. of 1939 § 3672)] has no effect on the

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2. We have used the term "Federal Tax Lien Act" generally to refer to 26 U.S.C. § 6323(a), as amended as well as to its predecessors [I.R.C. of 1939 § 3672 and Act of March 4, 1913, ch. 166, 37 Stat. 1016].

operation of the Federal Insolvency-Priority Statute.

STATUTES INVOLVED IN THIS CASE

This case involves the construction of two statutes: the Federal Tax Lien Act [26 U.S.C. § 6323(a); (I.R.C. of 1939 § 3672)] and the Federal Insolvency-Priority Statute [(31 U.S.C. § 191; (Rev.Stat. § 3466)]. The text of these statutes is set forth at Appendix E, p. 40A and pp.65A-66A, respectively.

STATEMENT OF THE CASE[3]

Petitioner, MARIE D. NESBITT, was represented by her former attorney, Franklyn K. Brann ("Brann"), in a divorce proceeding in 1971. Mrs. NESBITT had been married for more than 30 years and was

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3. With one exception (which is more in the nature of a conclusion of law than a statement of fact), NESBITT finds the material facts to be accurately stated in the opinion of the District Court and has expanded upon them here only for the convenience of this Court: At App. B, p. 8A, the District Court states that upon Brann's death, "the Capp Street property passed to his estate". While it may be true that bare legal title to the

partially physically disabled at the time of the divorce action. In that proceeding, Attorney Brann allowed a default judgment to be taken against his client, Mrs. NESBITT, and, as a result, Mrs. NESBITT received only a very small percentage of the community property and no spousal support of any kind.

In a subsequent attorney malpractice action against Attorney Brann, Mrs. NESBITT was awarded a judgment in the amount of $225,061.00, none of which has been collected to date. Her judgment was entered on April 27, 1976, and an abstract of the judgment was properly recorded in

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property passed to Brann's estate upon his death, this statement is misleading to the extent it suggests that Brann's executor had any interest in the property superior to that of NESBITT. NESBITT was not required to await payment of her claim in the course of administration of Brann's estate, but instead could have foreclosed upon the Capp Street property through the use of the same type of civil action that is used in mortgage foreclosures. [See Cal. Probate Code § 716 and § 732 and Corporation of America v. Marks 10 Cal.2d 218, 220-221 (1937)]

the Official Records of the County Recorder of the County of San Francisco on April 28, 1976. (App. B, pp. 6A-7A).

Under California law[4] the recording of this abstract of judgment gave NESBITT a judgment lien upon all real property belonging to Brann in the county of San Francisco.

Attorney Brann died on May 26, 1976. At his death, Brann and his wife owned an undivided thirteen percent (13%) interest in certain real estate located in the City and County of San Francisco, commonly known as 540 Capp Street, as their community property ("the Capp Street property"). (App. B, pp. 6A-8A).

All of the defendants[5] except for Defendant SAFECO are also creditors of

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4. California Code of Civil Procedure § 674(a) (App. E, pp.66A-68A, infra).

5. The names of all of the defendants in the District Court (respondents in this court) are set forth in footnote 1, p. 1, supra.

Brann. The only liens against the Capp Street property which were superior in time to Mrs. NESBITT'S judgment lien were as follows (App. B, pp. 7A-8A):

Lienor	Amount	Date Recorded	Type of Lien
Union Credit Co.	$267.57	4/16/75	Judgment Lien
City and County of San Francisco	$772.56	7/28/75	Lien for personal property
City and County of San Francisco	$280.10	8/1/75	Judgment Lien

The UNITED STATES recorded Notices of Tax Liens with the County Recorder of the County of San Francisco as follows (App. B, p.7A):

Date	Amount	Number
September 7, 1976	$ 436.77	9401(F) 76-1997
January 17, 1977	$50,674.29	9401(F) 77-464
January 25, 1977	$ 4,761.66	9401(F) 77-504

The California FRANCHISE TAX BOARD also held two tax liens against Brann, one of which was recorded on May 27, 1976, in the amount of $5,489.36, and

the other recorded on June 7, 1976, in the amount of $704.77 (App. B, p. 7A)[6]

Brann's estate did not have assets of sufficient value to pay and satisfy all valid claims of indebtedness against it, and a dispute arose as to who should be first paid from the proceeds of the sale of the Capp Street property. So that the property could be sold, the parties entered into an agreement pursuant to 26 U.S.C. § 6325(b)(3), with all claims to attach to the sales proceeds (App. B, pp. 8A-9A)[7]. The net proceeds of the sale allocable to Brann's interest in the Capp Street property amounted to $39,839.51 and were deposited with SAFECO (App. B, p.9A),

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6. The FRANCHISE TAX BOARD conceded that its tax liens were inferior to the claim of NESBITT (Clerk's Record, pp. 144-145).

The Capp Street property was also subject to six other claims, all of which were released upon full payment to the various claimants (App. B, p. 8A).

7. The text of 26 U.S.C. § 6325(b)(3) is set forth at App. E, pp.62A-63A.

who continues to hold the same pending final determination of this cause.

On May 26, 1977 NESBITT filed suit in the United States District Court for the Northern District of California to determine who has priority to payment from the proceeds of the sale of the Capp Street property. Jurisdiction in the District Court was based on 26 U.S.C. § 7426(a)(3) and 28 U.S.C. § 1346(2)(e).[8]

Section 6321 of 26 U.S.C. (I.R.C. of 1939 § 3670)[9] creates a lien in favor of the United States for the amount of tax, together with incidentals, that anyone has neglected to pay upon "all property and

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8. The text of 26 U.S.C. § 7426(a)(3) and 28 U.S.C.§ 1346(2)(e) are set forth at App. E p. 63A and pp. 64A-65A, respectively.

9. The text of 26 U.S.C. § 6321 is set forth at App. E, p. 39A. Section 6321 (I.R.C. of 1939 § 3670)is based on Revised Statutes § 3186 as amended by § 3 of the Act of March 1, 1879 [See U.S. v. Security Trust Savings Bank, 340 U.S. 47, 52 (1950)].

rights to property, whether real or personal, belonging to such person." However § 6323(a) of 26 U.S.C.[10], and its predecessors (I.R.C. of 1939 § 3672 and Act of March 4, 1913 ch. 166, 37 Stat. 1016) have each granted protection to certain private creditors from federal tax liens of which notice has not been filed in a duly designated office. The 1913 act (Act of March 4, 1913, ch. 166, 37 Stat. 1016) granted protection from such unfiled liens only to "purchasers," "mortgagees" and "judgment" creditors. In 1939 the list of protected creditors was expanded to afford similar protection to "pledgees" (I.R.C. of 1939, § 3672). In 1966, the list of protected creditors was again expanded this time to include "holders of a security interest" and mechanics lienor(s) (Federal Tax Lien

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10. The text of 26 U.S.C. § 6323(a) is set forth at Appendix E, p. 40A, infra.

Act of 1966. 80 Stat. 1125, amending 26 U.S.C. § 6323).[11]

The parties agreed that, but for the insolvency of Brann's estate, NESBITT'S judgment lien claim against Brann, being

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11. The 1966 act also provided protection from Federal Tax Liens for certain private creditors, even in cases in which notice of a tax lien had already been filed. (See for example § 6323 (b)(1), providing protection for certain purchasers and holders of security interests in securities; § 6323(b)(2) providing protection for certain purchasers of motor vehicles; § 6323(b)(3) providing protection for certain purchasers of personal property at retail; § 6323(b)(4) providing protection for certain purchasers of personal property at casual sales; § 6323(b)(5) providing protection for certain holders of possessory liens; § 6323(b)(6) providing protection to certain holders of liens against real property; § 6323(b)(7) providing protection to certain mechanic's lienors; § 6323(b)(8) providing protection to certain holders of attorney's liens; § 6323(b)(9) providing protection to insurers under certain insurance contracts; § 6323(b)(10) providing protection to certain institutions making loans on the security of passbook accounts; § 6323(c) providing protection for lien holders in certain commercial financing transactions. §6323 (d) providing protection for certain security interests; and § 6323(e) providing protection for certain claims for interest expenses, attorneys' fees and trustees' fees. (The text of these statutes is set forth at App. E, pp.40A-56A).

perfected under state law[12] prior in time to the United States' tax liens, would, under the provisions of 26 U.S.C. § 6323(a) be entitled to satisfaction from the proceeds of the sale of the Capp Street property prior to any tax lien claim of the federal government (App. B, p. 9A-10A).

The Federal Insolvency-Priority Statute (31 U.S.C. § 191 (Rev.Stat. § 3466)[13] states that "(w)henever any person indebted to the United States is insolvent, or whenever the estate of any deceased

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12. California Code of Civil Procedure, § 674(a) (App. E, pp. 66A-68A, infra).

13. The Federal Insolvency-Priority Statute[31 U.S.C. § 191, (Rev.Stat. § 3466)] (App. E, pp.65A-6A, infra) can be traced back to the Act of July 31, 1789, ch 5, § 21, 1 stat 42, the fifth statute enacted by the first Congress. It has been substantially in its present form since the Act of March 3, 1797, ch 20, § 5, 1 stat. 515. It was most recently amended by Public Law 95-598, 92 stat. 2679, November 6, 1978, which added a sentence at the end of the section stating that the priority established thereunder does not apply in cases under Title 11 of the United States Code which deals with bankruptcy proceedings. This amendment appears to be declarative of existing

debtor ... is insufficient to pay all debts due from the deceased, the debts due the United States shall first be satisfied." Since Brann's estate is insolvent, there is no dispute that § 3466 applies here. (App. B, p. 11A). Accordingly this case squarely presents the issue of whether in a tax case, the Federal Tax Lien Act impliedly limits the effect of the Federal Insolvency-Priority Statute, so that creditors of a taxpayer who are expressly protected from claims of the United States under the terms of the Tax Lien Act are also protected from claims of the United States under the Insolvency-Priority Statute.

If this court should reach the conclusion that the Federal Tax Lien Act does not limit the scope of the Insolvency-

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law: [See United States v. Emory, 314 U.S. 423, 427 (1941), and Plum, "The Federal Priority in Insolvency", Proposals for Reform, 70 Mich. L. Rev.3, 6-9 (1971)].

Priority Statute, this case will present a second issue: whether there is an implied exception from the effect of the Insolvency-Priority Statute for a creditor with a fully perfected choate judgment lien on real property. There is no dispute that NESBITT'S lien was perfected under state law (App. B, p. 9A), nor is there any dispute that NESBITT'S lien was choate, at least within the standards of the cases arising under the Tax Lien Act, since a choate lien is one in which "the identity of the lienor, the property subject to the lien, and the amount of the lien are established."[14] However many of the cases which have to date found on implied exception to the operation of the Insolvency-Priority Statute have also required that

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14. United States v. New Britain, 347 U.S. 81, 84 (1954) (See also the opinion of the District Court; App. B, p. 29A, note 16). In the present case the identity of the lienor is NESBITT, the property subject to the lien is the Capp Street property and the amount of the lien is $225,061 (App. B, p. 6A).

the private claimant have a lien which is "specific" or that the private claimant have obtained either "title" or "possession" to the subject property.[15] Almost all of these cases have involved competing claims to personal property. The last Supreme Court case dealing with judgment liens on real property in relation to the Insolvency-Priority Statute was the case of Thelusson v Smith, 2 Wheat. 396, 15 U.S. 396, 4 L.Ed. 271 (1817). Thelusson held that a private creditor's judgment lien did not have priority over the government's claim under the Insolvency-Priority Statute. However, Thelusson was decided at a time when recording statutes were not well developed and there was nothing to prevent a judgment debtor from transferring title to his real property to a bone fide purchaser and thereby de-

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15. See cases cited at App. B, at pp. 27A-32A, infra.

feating the claim of the judgment creditor.[16] While concepts of "specificity," "title" and "possession" may be important in valuing the worth of a lien on personal property, (where a debtor possession always retains the power to defeat his creditor by disposing of the property), it is NESBITT'S position that such concepts have no significance in valuing the worth of a lien on real property in the face of modern recording statutes.[17] Accordingly, if this court should reach the conclusion that the Federal Tax Lien Act does not limit the scope of the Insolvency-Priority

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16. See Conard v. The Atlantic Insurance Co. of New York, 1 Peters 385, 443, 7 L.Ed 189, 214 (1828) and the opinion of the District Court, App. B at pp.30A-31A).

17. NESBITT'S judgment lien would defeat the claim of a later recording purchaser even if the purchaser had both bare legal title and possession. Under the circumstances, it would be anomalous to say that the claim of such a purchaser would defeat the government's claim under the Insolvency-Priority Statute if NESBITT'S lien were itself defeated by the government's claim.

Statute, NESBITT submits that the time is ripe for the court to reevaluate the rule of Thelusson.

In the District Court, NESBITT and the UNITED STATES each moved for summary judgment (App. B, p.5A) and the Court granted the governments motion (App. B, p. 33A).

The Ninth Circuit, in a three paragraph opinion, adopted the bulk of the opinion of the District Court and affirmed (App. A, pp. 1A-3A).

REASONS FOR GRANTING THE PETITION

I. The decisions of Ninth and Sixth Circuits are in conflict with the decisions of the Supreme Courts of Pennsylvania and North Carolina, the Appellate Department of the Superior Court of New Jersey, the U.S. District Court for the District of South Dakoda, and language of decisions of the Fifth and Second Circuits.

It is plainly desirable that there be a uniform rule for determining the priorities between private judgment liens and competing federal tax liens. Uni-

formity has proved to be an elusive goal.[18] The Courts of Appeal in the Ninth and Sixth Circuits have held that the Federal Tax Lien Act [26 U.S.C. § 6323(a) (I.R.C. of 1939, § 3672)] has no effect on the operation of the Federal Insolvency-Priority Statute [(31 U.S.C. § 191 (Rev. Stat. § 3466)].[19]

The Supreme Courts of the States of Pennsylvania and North Carolina, the Appellate Department of the Superior Court of the State of New Jersey and a Federal District Court in South Dakota have

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18. The principal cases on each side of the main issue in this case, which had been decided as of the date of the decision of the District Court (Feb. 1, 1978), are listed at footnote 9 of that decision (App. B, at p. 15A, infra).

19. Nesbitt v. United States, 622 F.2d 433 (9th Cir. 1980); Commonwealth of Kentucky Dept. of Rev. v. United States, 383 F. 2d 13, 15-16 (6 Cir. 1967).

reached precisely the opposite conclusion.[20]

20.

A. In the case of In Re Decker's Estate, 355 Pa. 331; 49 A.2d 714 (1946) Cert. denied sub. nom. Decker v. Kann, 331 U.S. 807 (1947) the Supreme Court of Pennsylvania said:

> "...It is urged by appellants that Section 3672 of the Internal Revenue Code ... should not be construed as overriding Section 3466 of the Revised Statutes but as being limited to solvent debtors whereas Section 3466 relates to insolvent debtors. It is obvious, however, that such a construction of Section 3672 would be quite unreasonable, since there could be no need or reason for such legislation if intended to provide merely for relative priorities in the distribution of assets of solvent debtors." 49 A.2d at 719-720.

B. In National Surety Corp. v. Sharpe, 236 N.C. 35; 72 S.E. 2d 109 (1952), the Supreme Court of North Carolina said:

> "In enacting the provision of 26 U.S.C.A. Section 3672...Congress impliedly amended...31 U.S.C.A. § 191 giving debts due the United States priority..."72 S.E. 2d at 109.

C. In City of Vermillion v. Stan Houston Equipment Co., 341 F. Supp. 707, 713 (S.D.S.D. 1972), the court said:

> "26 U.S.C.A. sec. 6323(a) was enacted long after 31 U.S.C.A. sec. 191 and is plainly inconsistent with it. Congress could not have intended any other purpose for 26 U.S.C.A. sec. 6323(a) than to give certain creditors priority over unfiled claims of the United States."

The Fifth and Second Circuits have used language which can only be read as expressing a firm belief that § 6323(a) limits the scope of the Insolvency-Priority Statute.[21]

21.

A. In Exchange Bank and Trust Co. v.Tubbs Manufacturing Co., et al., 246 F. 2d 141, 143 (5th Cir. 1957), cert. denied sub. nom. City of Dallas, Texas v. Tubbs Manufacturing Co., Inc., 355 U.S. 868 (1957), the taxpayer was insolvent. In reversing a judgment in favor of the United States, the 5th Circuit said:

> "...(F)or the reasons stated by us in the Atlantic case supra, and for the additional reason that in this case the mortgage liens are within Sec. 6323, ... we are in no doubt that the claim of the United States to priority over the mortgage claims is without foundation." (246 F.2d at 143).

B. In United States v. S.K.A. Associates, Inc., 600 F. 2d, 513 (5th Cir., 1979), the 5th Circuit said:

> "...The Supreme Court's meticulous rationale in Kimball rejecting every Government argument for favored treatment makes so much good sense that it should be applied effectively. To hold that federal law adopts state commercial law in a dispute between lienholders when the debtor is solvent, but not when he is insolvent, would deprive private lenders of equanimity when it is most needed. We, therefore, reject the argument that § 191 gives the Government as a secured lienholder a priority over other lienholders that it would not enjoy under state commercial law." (600 F.2d at 516)

II. This case presents an issue of exceptional importance.

This case squarely presents the question of whether in a tax case, the Federal Government may use its priority under the Federal Insolvency Statute to defeat a creditor who is expressly protected from the Government's Tax Lien by the terms of the Federal Tax Lien act. This is an issue of exceptional importance. The 1968 Statute Edition of Shepard's United States Citations contains over 500 citations to the Insolvency Statute (31 U.S.C. § 191) and over 250 citations to the Federal Tax Lien Act [26 U.S.C. § 6323(a)].

In a concurring opinion in H.B. Agsten & Sons, Inc. v. Huntington Trust & Savings Bank, 388 F2.d 156, (4th Cir. 1967); cert. denied 390 U.S. 1025 (1968), Justice Haynsworth noted the importance of the

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C. See also United States v. Vermont, 317 F. 2d 446, 449 & n.3 (2nd Cir. 1963), aff'd 377 U.S. 351 (1964).

very question presented by this case:

> "It is most unfortunate that the Congress, when considering the Federal Tax Lien Act of 1966, did not focus its attention specifically upon the Insolvency Statute. Had it done so, I am confident the Insolvency Statute would have been repealed or substantially amended, for all of the time, attention and effort expended in drafting, considering and passing the Federal Tax Lien Act of 1966 will be fruitless, except in bankruptcy cases, if the Insolvency Statute is applied to preserve the super-priorities which the Federal Tax Lien Act of 1966 undertook to withdraw from tax claims. The question of priorities is wholly or largely academic, unless the debtor is insolvent, and the clearly stated purpose of the Federal Tax Lien Act of 1966 was to regulate the priority of federal tax claims when competing for payment out of the assets of an insolvent taxpayer with secured claims which would enjoy priority under state law. 388 F2.d at 161

Unless certiorari is granted and the decision of the Ninth Circuit reversed, the Government will use this case to forge ahead and defeat the claims of all those creditors who it had been previously assumed were protected from the claims of the Government.

III. The decision below conflicts with controlling principals announced in the decisions of this court:

A. In United States v. Gilbert, 345 U.S. 361 (1953) the United States asserted tax liens against an insolvent taxpayer. The town of Walpole, New Hampshire, asserted priority over the claims of the government for its own tax liens. The Supreme Court addressed itself to the question which it considered to be dispositive of the case:

> "Was the town a judgment creditor within the meaning of Section 3672?" (345 U.S. at p. 363)

The court went on to decide in favor of the United States by a 7-2 vote on the ground tha the town was not a judgment creditor. However, it was implicit in the decision of all nine (9) justices, that the town would have prevailed despite the insolvency of the taxpayer if the town had been a judgment creditor.

Admittedly, the language quoted above

is dicta; but in view of the fact that all nine justices assumed that if the creditor of the taxpayer qualified as a judgment creditor within the meaning of the Federal Tax Lien Act (I.R.C. of 1939, § 3672), he would have prevailed over the Federal government, despite the taxpayer's insolvency, it is powerful dicta indeed.[22]

B. More recently, in U. S. v. Crittenden, 563 F.2d 678 (5th Cir. 1977), 440 U.S. 715, 723 (1979),[23] this court stated:

> The Federal Tax Lien Act of 1966, 80 Stat. 1125, as amended, 26 U.S.C. § 6323, provides further evidence that treating the United States like any other lender would not undermine Federal interests. These amendments modified the Federal Government's preferred position under the choateness

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22. The portion of the opinion in United States v. Gilbert dealing with "specificity" (345 U.S. at 361) relates only to the question of whether the town could prevail even though it was not a judgment creditor. Since the case does not deal with liens on real property, that portion of the opinion is not relevant to the case now before this court.

23. United States v. Crittenden, 440 U.S. 715, 723 (1979) was the companion case to United States v. Kimball Foods, Inc., 440 U.S. 715 (1979).

> and first in time doctrine, and recognized the priority of many state claims over Federal tax liens. In enacting this legislation, Congress sought to 'improv(e) the status of private secured creditors' and prevent impairment of commercial financing transactions by 'moderniz(ing) ... the relationship of Fedral tax liens to the interests of other creditors.' ... We do not suggest that Congress' actions in the tax lien area control our choice of law in the commercial lien context. But in fashioning Federal principals to govern areas left open by Congress, our function is to effectuate Congressional policy (citation omitted). To ignore Congress' disapproval of unrestricted Federal priority in an area as important to the nation's stability as taxation, would be inconsistent with this function. Thus, without showing that application of state laws would impair Federal operations, we decline to extend to new contexts extraordinary safeguards largely rejected by Congress. (440 U.S. at 738)

IV. THE DECISION OF THE NINTH CIRCUIT UNDERMINES THE WORK OF CONGRESS IN ENACTING 26 U.S.C. § 6323 AND ITS PREDECESSORS.

The opinion of the District Court points out that the Insolvency-Priority Statute does not apply to all types of insolvencies (App. B, p. 24A). We agree that § 3466 does not apply to certain

types of temporary technical insolvencies. However, the language of § 3466 makes it clear that it was intended to apply to every situation in which there is a serious likelihood that all of the creditors of a debtor will not be paid. Section 3466, by its terms, applies "to cases in which an act of bankruptcy is committed." The six (6) acts of bankruptcy were set forth in § 3A of the Bankruptcy Act, 11 U.S.C. § 21.[24] Particularly significant is the third act of bankruptcy, which is defined as follows:

> "Acts of bankruptcy by a person shall consist of his having ...(3) suffered or permitted, while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings or distraint and not having vacated such lien within thirty days from the date set for any sale or other disposition of such property."

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24. With the passage of the new Bankruptcy Code (Pub. Law 95-598, Title I, Nov. 6, 1978, 92 Stat. 2549; 11 U.S.C. § 101 et seq.) former 11 U.S.C. 21 was repealed. The new Bankruptcy Code does make use of the concept of "Acts of Bankruptcy" (see 11 U.S.C.A. § 303(h), note "h" at p. 156). Since the Insolvency-Priority Statute still makes use of the term "act of bankruptcy" we have referred to

A debtor was defined as insolvent within the meaning of the Bankruptcy Act, "whenever the aggregate of his property...shall not at fair valuation, be sufficient in amount to pay his debts;". 11 U.S.C. § 1.[25] Therefore, even though a "mere inability of the debtor to pay all his debts in the ordinary course of business is not insolvency within the meaning of the act...", United States v Oklahoma, 261 U.S. 253, 260 (1923), as soon as a debtor whose assets exceed his liabilities allows a lien to attach to his property for a period of thirty days, he falls within §3466.

The Ninth Circuit would have this court believe that a creditor of a taxpayer may have the "benefits" of § 6323 only when there is really nothing at stake. The 1966 Amendment to the Tax Lien

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former 11 U.S.C. § 21 for a definition of the term.

25. See footnote 24, supra

Act represents the culmination of ten years of analysis and study by the Treasury Department and the Congress. U.S. Code and Administrative News, 89th Cong. 2d. Session (1966) V.3, pp. 3722-3723, "Senate Report No. 1708". The passage of § 6323, as well as the passage of the earlier amendments to the Tax Lien Act, were not idle acts on the part of Congress. The listing of the creditors protected from Federal Tax Liens by the 1966 Amendment to the Tax Lien Act encompasses over fifteen pages in the Appendix of Statutes attached to this Petition . (App. E, pp. 40A-56A (26 U.S.C. § 6323(a) through § 6323(e) infra).

The opinion of the District Court states that there is nothing in the legislative history of the Federal Tax Lien Act indicating "any congressional intent to override § 3466" (App. B at p. 19A, infra). The answer to this argument is that it never even occurred to Congress that

the Internal Revenue Service would attempt to use § 3466 to gain priority over the claims of persons expressly protected by the mandate of § 6323(a). The legislative history of the 1966 Amendment to the Tax Lien Act is exhaustively set forth in the 784-page Legislative History of the Federal Tax Lien Act of 1966, 89th Cong., 2d Session, by the Committee on Ways and Means of the House of Representatives. This document contains not one word which would suggest that anyone even hinted to the Congress that the government could use its priority under § 3466 to defeat the lien of a person expressly protected from claims of the government by § 6323. Former Assistant Secretary of the Treasury Stanley R. Surrey submitted a statement to the House Committee on Ways and Means urging the passage of the 1966 Amendment to the Tax Lien Act, but he did not suggest that the amendment was intended to benefit only creditors of solvent taxpay-

ers. In the course of its hearings, Laurens Williams, Chairman of the Special Committee on Federal Tax Liens of the American Bar Association, addressed the Committee. Despite the fact that the A.B.A. had earlier proposed legislation which would have completely rewritten §3466, Mr. Williams expressed great satisfaction with the bill as written. There is nothing in his remarks which would suggest that he believed it necessary to amend § 3466 in order to protect persons, expressly protected from the claims of the government by § 6323. Legislative History of the Federal Tax Lien Act of 1966, supra, at pp. 80-84 & 104-117.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

/s/
Franklin J. Flocks
Attorney for Petitioner

Dated: January 22, 1981

APPENDIX A

Marie D. NESBITT, Plaintiff-Appellant,

v.

UNITED STATES of America, Safeco Title Insurance Company, a California Corporation; the City and County of San Francisco; L.T. Goldmeyer dba Union Credit Company; and the Franchise Tax Board, an agency of the State of California, Defendants-Appellees.

No. 78-2111.

United States Court of Appeals,
Ninth Circuit.

June 26, 1980.

Appeal from the United States District Court for the Northern District of California; Charles B. Renfrew, Judge.

Franklin J. Flocks, Palo Alto, Cal., for plaintiff-appellant.

Joan I. Oppenheimer, Washington, D.C., for defendants-appellees.

Before SNEED and POOLE, Circuit Judges, and PFAELZER*, District Judge.

Appellant, appeals from a summary judgment of the district court granting priority to the United States' tax lien claims over the judgment lien claim of the appellant. Both appellant and appellee agree that but for the provisions of Revised Statutes §3466, 31 U.S.C. §191, appellant would be entitled to priority. The district court held that section 3466 was applicable, with the consequence that the United States was entitled to priority, and that the appellant's lien was not excepted from the operation of section 3466. We affirm.

The reasons for our affirmance were stated quite well in the district court's opinion which appears in 445 F.Supp. 824(N.D.Cal. 1978). We adopt Judge

***Honorable Mariana R. Pfaelzer, United States District Judge for the Central District of California, sitting by designation.**

Renfrew's opinion to the extent of Parts I, II, and III.A As to Part III.B, we merely wish to hold that to the extent an exception to section 3466 might exist for "perfected and specific liens," the lien of the appellant was not sufficiently perfected and specific to come within any such exception.

Affirmed.

APPENDIX B

Marie D. NESBITT, Plaintiff,

v.

UNITED STATES of America, Safeco Title Insurance Company, a California Corporation, the City and County of San Francisco, L.T. Goldmeyer dba Union Credit Company, and the Franchise Tax Board, an agency of the State of California, Defendants.

No. C-77-1126-CBR

United States District Court,

N.D. California.

Feb. 1, 1978.

Daniel J. Parks, Pico & Parks, San Mateo, Cal., for plaintiff.

G. William Hunter, U.S. Atty., John M. Youngquist, Asst. U.S. Atty., San Francisco, Cal., for defendant United States of America.

Thomas E. Alborg, San Francisco, Cal., Safeco Title Insurance Co., for defendant Safeco Title Insurance Co.

Thomas M. O'Connor, City Atty., Virginia J. Lum, Deputy City Atty., San Francisco, Cal., for defendant City and County of San Francisco.

MEMORANDUM OF OPINION

RENFREW, District Judge

This is an action instituted by plaintiff seeking a determination that her claim to certain proceeds from the sale of real property has priority over any claims of the United States to such proceeds. The United States has filed a cross-claim seeking a determination that it is entitled to first priority payment from the same sales proceeds. Both parties have moved for summary judgment on their respective claims. Arguments on the motion were heard on November 10, 1977. Having carefully considered the arguments of counsel and the legal memoranda, affidavits, and exhibits filed in support of and in opposition to the motions, the Court concludes that there is no genuine issue as to any material fact and that the United States is entitled to summary judgment in its favor as a matter

of law.

I. FACTUAL BACKGROUND

The complaint, originally filed on May 26, 1977, and amended by stipulation on August 8, 1977, named as defendants the United States, the City and County of San Francisco (the "City"), L.T. Goldmeyer, d.b.a. Union Credit Company ("Union Credit"), the Franchise Tax Board of the State of California ("Franchise Tax Board"), and Safeco Title Insurance Company ("Safeco"). Plaintiff and each defendant except Safeco are claimants to the proceeds from the sale of certain real property (the "Capp Street property") in which one Franklyn K. Brann ("Brann"), together with his wife, owned an undivided 13 per cent interest.

Plaintiff and the claimant-defendants are creditors of Brann. Plaintiff holds a judgment against Brann for $225,061,[1] an

1. Plaintiff's judgment against Brann was entered upon the latter's default in a malpractice

abstract of which was recorded on April 28, 1976. The United States has assessed certain Internal revenue tax liabilities totalling $89,160.06 against Brann.[2] Notices of tax liens were recorded on September 7, 1976 for $436.77; on January 17, 1976, for $50,674.29; and on January 25, 1977, for $4,761.66. Union Credit holds a judgment against Brann for $267.57, an abstract of which was recorded on April 16, 1975. The City has assessed certain personal property tax liabilities totalling $772.56 against Brann and recorded a certificate of

action. The complaint in that action charged Brann with responsibility for a default entered against Plaintiff in a 1971 divorce proceeding in which Brann had represented plaintiff.

2. In its cross-claim, the United States alleged that Brann was indebted to it in the sum of $54,167.54. In a declaration submitted by the United States, counsel stated the amount of indebtedness to be $89,160.06, and exhibits were submitted supporting this figure. Since only $39,839.51 is available to satisfy the parties' claims, the Court need not resolve the conflict between the figure alleged in the cross-claim and the figure set forth in the declaration.

delinquency of such taxes on July 28, 1975. The City also holds a judgment against Brann in the amount of $280.10, an abstract of which was recorded on August 1, 1975. The Franchise Tax Board holds two tax liens against Brann, one of which was recorded on May 27, 1976, in the amount of $5,489.36, the other recorded on June 7, 1976, in the amount of $704.77.[3]

On May 26, 1976, Brann died and the Capp Street property passed to his estate. Since the estate did not have assets of sufficient value to pay and satisfy all valid claims of indebtedness against it, a dispute arose as to who should be first paid from the proceeds from the sale of the Capp Street property. So that the property could be sold, plaintiff, the United States, Union

3. The Capp Street property was also subject to six other claims, all of which were released upon full payment to the various claimants.

Credit, and the City entered into an agreement whereby the property was to be sold pursuant to 26 U.S.C. §6325(b)(3),[4] with all claims to attach to the sales proceeds. Safeco now holds the sum of $39,839.51, which are the net proceeds of sale allocable to Brann's interest in the Capp Street property.

The question presented, simply stated, is who has priority to payment from these sales proceeds. The parties agree that, but for the insolvency of Brann's estate, the judgment lien claim of plaintiff against Brann, being perfected under state law prior in time to the United States tax liens, would, under the provisions of 26 U.S.C. §6321 et seq., be entitled to satisfaction from

4. Section 6325(b)(3) provides:
"Subject to such regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to the lien if such part of the property is sold and, pursuant

these proceeds prior to any tax lien claim of the federal government. The United States contends, however, that because Brann's estate is insolvent, its claims are entitled to priority under the provisions of Revised Statutes §3466, 31 U.S.C. §191.

II. APPLICABILITY OF §3466

Section 3466 of Revised Statutes provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by

to an agreement with the Secretary or his delegate, the proceeds of such sale are to be held, as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the discharged property."

process of law, as to cases in which an act of bankruptcy is committed.[5]

It is not disputed that §3466 applies here. There is an estate which is insufficient to pay all the debts due from the deceased,[6] and there are debts due to the United States from the estate. Taxes due

5. Section 3466 has been in substantially its present form since the Act of March 3, 1797, ch. 20, §5, 1 Stat. 515.

6. In a declaration submitted by the United States, Rudolph Nothenberg, the executor of Brann's estate, stated that the "estate is without assets of value sufficient to pay and satisfy all valid claims of indebtedness against it and that said estate is accordingly insolvent." Plaintiff has not disputed this statement, and the Court accepts it for purposes of the within motions.

Plaintiff does argue, however, that even though the estate is insolvent, §3466 is not applicable since (1) the vast bulk of tax liens here involved were recorded against both Brann and his wife, and there is no evidence that Mrs. Brann is insolvent, and (2) there are other resources from which the federal government could satisfy its claims, e.g., certain other real property which was the home of Brann and his wife. Plaintiff has submitted no factual support for the second contention. As for the first contention, even assuming that Mrs. Brann is a joint debtor and that she is solvent, the application of §3466 does not depend on whether there is a solvent joint debtor to which the United States can look for satisfaction of its debts. The United States is entitled to priority under §3466.

the United States have long been recognized as debts for purposes of §3466. See Price v. United States, 269 U.S. 492, 499 (1926). There is, therefore, no question that the claim asserted here by the United States is within the purview of §3466.

III. CLAIMED EXCEPTIONS TO §3466

Having decided as a preliminary matter the applicability of §3466, the Court now addresses plaintiff's arguments that the United States does not have priority under that section over her judgment lien since (1) the Federal Tax Lien Act of 1966 (the "FTLA"), and in particular 26 U.S.C. §6323(a), created an exception to §3466 which excepts her lien from the operation of §3466 and (2) her lien is perfected and specific and therefore excepted from the operation of §3466.[7]

7. Plaintiff also contends that she should prevail over the federal government because Brann

A. Internal Revenue Code §6323(a)

Section 6321 creates a lien in favor of the United States for the amount of tax, together with incidentals, that anyone has neglected to pay, upon "all property and rights to property, real or personal, belonging to such person." 26 U.S.C. §6321.[8] Section 6323(a), however, provides in relevant part:

> The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor or, judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate. 26 U.S.C. §6323(a)

Since plaintiff is a judgment lien creditor, and since notice of the federal

had no remaining property rights in the proceeds of sale. This contention is patently without merit. The existence of a judgment lien does not deprive the judgment debtor of his rights to property subject to the lien.

8. Section 6321 was not amended by the FTLA, but for purposes of convenience the Court will refer to §6321 and all other relevant sections dealing with federal tax liens as the FTLA.

government's tax liens was not filed before plaintiff recorded her judgment lien, the United States tax liens are not valid against plaintiff's lien under the provisions of the FTLA. Plaintiff argues that this also means that the United States is not entitled to priority under §3466 since the FTLA, and in particular 26 U.S.C. §6323(a) overrides §3466 where the debts due to the United States are for taxes due. Specifically, plaintiff argues that §3466, a broad general priority statute, is inconsistent with the FTLA, a specific tax lien priority statute, and that the specific rule of the FTLA, which gives plaintiff's judgment lien priority over the federal government's tax liens, should therefore prevail over the general rule of §3466.

The Court of Appeals for this Circuit has not yet addressed the question. Although several courts have dealt general-

ly with this question,[9] no court appears to have fully addressed it. Because of the novelty and importance of the question, the Court sets forth below the reasons which lead it to conclude that the FTLA and §6323(a) do not create any exception to the operation of §3466.

9. Several courts have held that the provisions of §3466 are limited by the FTLA and §6323(a), see City of Vermillion, S.D. v. Stan Houston Equipment Co., 341 F.Supp. 707, 713 (D.S.D. 1972); In re Decker's Estate, 355 Pa. 331, 49 A.2d 714 (1946), cert. denied sub nom. Decker v. Kann, 331 U.S. 807 (1947); National Surety Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952); James Talcott, Inc. v. Roto American Corp., 123 N.J.Super. 183, 302 A.2d 147 (1973), and at least two circuits have used language which can only be read as expressing a belief that §6323(a) does so limit §3466, see United States v. Vermont, 317 F.2d 466, 449 & n.3 (2 Cir. 1963), aff'd 377 U.S. 351 (1964); Exchange Bank & Trust Co. v. Tubbs Manufacturing Co., 246 F.2d 141, 143 (5 Cir.) cert. denied sub nom. City of Dallas, Texas v. Tubbs Manufacturing Co., Inc., 355 U.S. 868 (1957). Other courts, however, have held that §6323(a) does not create any exception to the operation of §3466. See Commonwealth of Kentucky, Dept. of Rev. v. United States, 383, F.2d 13, 15-16 (6 Cir. 1967); Spira v. United States, 76-2 USTC ¶9600 (N.D.Ill.1976); see also James v. United States, 366 U.S. 213, 252 n.4 (1961) (Whitaker, J., concurring in part and dissenting in part); H.B. Agsten & Sons, Inc. v. Huntington Trust & Savings Bank, 388 F.2d 156, 161 (4 Cir. 1967) (Haynsworth, C.J., concurring), cert. denied, 390 U.S. 1025 (1968)

The predecessor of the FTLA was the Act of July 13, 1866, ch. 184 §9, 14 Stat. 107, which provided in part:

> And if any person, bank, association, company, or corporation, liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company, or corporation * * *.[10]

The purpose of this act, as recently stated by former Congressman Mills, then Chairman of the House Ways and Means Committee and sponsor of the FTLA, was to "[assist] in the collection of the revenues." Indeed, one of the purposes of the FTLA, according to Congressman Mills, was to "improv[e] the ability of the Federal tax liens to fulfill their original function." 112 Cong.Rec.22224 (1966). There

10. This act amended the Act of March 3, 1865, ch. 78, 13 Stat. 470.

is nothing in either the language or the legislative history of the act to indicate that Congress intended to make tax liens the federal government's sole remedy for the collection of unpaid taxes. To the contrary, Congress intended tax liens to supplement existing means for the collection of taxes, including §3466. There is, therefore, no basis for saying that Congress, by creating federal tax liens, intended to modify §3466 in any way.

Plaintiff apparently realizes this since she cites §6323(a) as the specific provision which overrides §3466. Her argument is that Congress, by enacting this section to give certain classes of creditors, including judgment lien creditors, protection from federal tax liens, must have also intended to give such creditors protection from the government's priority under §3466. Plaintiff's argument is unsupported by legislative his-

tory. The predecessor of §6323(a) was the Act of March 4, 1913, ch. 166, 37 Stat. 1016, which gave purchasers, mortgagees, and judgment creditors protection against federal tax liens of which notice had not been filed in a duly designated office. [11] The purpose of this act, as expressed by its author, Representative Sterling, was to "amend Section 3186 of the Revised Statutes [the existing tax lien act]" "for the protection of innocent purchasers or mortgagees or judgment creditors without notice." 49 Cong.Rec. 1802 (1913). There is nothing in the legislative history of this act to indicate that innocent purchasers, mortgagees, and judgment creditors were also to be afforded protection from the federal government's priority under §3466, and the clear language of the statute is quite to the contrary.

11. In 1939, pledgees were afforded similar protection. See Revenue Act of 1939, §401, 53 Stat. 883. The FTLA amended §6323(a)to its present form.

Nor is there anything in the FTLA which supports plaintiff's argument. Although the FTLA was a comprehensive revision of the law of federal tax liens and priorities, it in no way affected the government's priority under §3466. Nothing in the legislative history of the FTLA indicates any congressional intent to override §3466. In fact, there is some evidence to the contrary. The American Bar Association ("ABA"), whose proposal ultimately led to the enactment of the FTLA, had recommended that Congress amend §3466 to coordinate the federal priority in insolvency with the relief against the federal tax lien proposed for certain liens and security interests (i.e., the relief afforded by §6323(a)). Report of the Special Committee on Federal Liens, in 84 ABA Annual Report 645, 731-736 (1959). Congress failed to act upon the ABA's proposal, however, apparently because the

ABA's recommendation affected many federal claims in addition to tax claims and therefore fell outside the jurisdiction of the congressional committees that considered the ABA's proposed tax lien legislation. Plumb, "The Federal Priority in Insolvency: Proposals for Reform," 70 Mich.L. Rev. 3, 8 (1971). In 1970, the ABA proposed a revised version of its insolvency priority recommendation., Id. at 9-10. This proposal was considered by the Senate Judiciary Committee, but the resulting bill never passed out of committee. See S. 2197, 92d Cong., 1st Sess. (1971). This Court cannot lightly disregard the fact that Congress has been requested on at least two occasions to amend §3466 in a manner which would achieve the result sought here by plaintiff, but it has not yet so amended that section.

The Court recognizes that the policies reflected in §6323(a) appear inconsistent

with affording a federal tax lien priority under §3466 over the claims of those creditors protected by the provisions of §6323(a). This is not, however, a sufficient basis to hold that §3466 has been impliedly amended. The Supreme Court has, on several occasions, stated that "'[o]nly the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of §3466.'" United States v. Moore, 423 U.S. 77, 82-83 (1975) (citation omitted); United States v. Key, 97 U.S. 322, 324-325 (1970); United States v. Emory, 314 U.S. 423, 433 (1941). This Court does not believe that, under the standards set forth by the Supreme Court, §6323(a) created an implied exception to the operation of §3466.

The operation of §3466 when a federal claim for taxes due conflicts with a claim of a purchaser, a holder of a secu-

rity interest, a mechanic's lienor, or a judgment lien creditor is not plainly inconsistent with §6323(a). Section 3466 and the FTLA are entirely separate entities. See H.B. Agsten & Sons, Inc. v. Huntington Trust & Savings Bank, 388 F.2d 156, 160 (4 Cir. 1967); cert.denied, 390 U.S. 1025 (1968); cf. United States v. Vermont, 377 U.S. 351, 357-358 (1964) (test for determining the choateness of a lien for purposes of the tax lien law is different from test for determining whether a lien is perfected and specific for purposes of §3466). For one thing, the two statutes operate in different contexts:

> "Section 3466 of the Revised Statutes grants a first priority to the Government as a creditor; [section 6321] creates a lien on 'all the property' of a delinquent taxpayer. The Section 3466 priority is not a lien; it covers all debts to the Government; it is available only in the case of an insolvent debtor whose property has passed to a third person--other than a trustee in bankruptcy--for the benefit of cred-

> itors; and it arises at the time of this transfer. The [section 6321] tax lien covers only tax debts; it arises regardless of the solvency of the taxpayer; and it attaches at the time the assessment list is received by the collector." Kennedy, "The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien," 63 Yale L.J. 905, 906 (1954) (footnotes omitted); see also H. B. Agsten & Sons, Inc., v. Huntington Trust & Savings Bank, supra, 388 F.2d at 160.

Moreover, the two statutes address different policies. Section 6323(a) is not a simple act of magnanimity on the part of Congress; by modifying federal tax liens to the advantage of certain competing interests, Congress may well have enhanced the government's chance of realizing taxes, owing to feeding of the lien by private credits. See Young, "Priority of the Federal Tax Lien," 34 U.Chi.L. Rev. 723, 725-726 (1967). No such motive exists in the determination of the government's priority under §3466. Ibid.

It may very well be that "[t]he

question of priorities is wholly or largely academic, unless the debtor is insolvent," H.B. Agsten & Sons, Inc. v. Huntington Trust & Savings Bank, supra, 388 F.2d at 161 (Haynsworth, C.J., concurring), but it does not follow from this that the FTLA is plainly inconsistent with §3466. Ibid. First, not all insolvencies are covered by §3466:

> "Mere inability of the debtor to pay all his debts in ordinary course of business is not insolvency within the meaning of the act, but it must be manifested in one of the modes pointed out in the latter part of the statute which defines or explains the meaning of insolvency referred to in the earlier part." United States v. Oklahoma, 261 U.S. 253, 260 (1923).

Second, the question of priorities may arise even where the debtor is solvent. The Government's need for tax liens extends to situations where there is a solvent debtor. For example, tax collections could be defeated by a transfer of a solvent taxpayer's assets before the institu-

tion of enforcement proceedings were it not for the FTLA. See Kennedy, supra, at 919-920.

The Court is not unmindful of the many policy reasons why the government should not be entitled to priority under §3466 when it is not entitled to priority under the FTLA.12 However, persuasive these policy reasons may be, they do not convince the Court that the FTLA is plainly inconsistent with §3466. Plaintiff's remedy, if there is to be a remedy, must come from Congress and not the courts.13

12. For a thorough discussion of these reasons, see Plumb, "The Federal Priority in Insolvency: Proposals for Reform," 70 Mich.L.Rev. 3 (1971)

13. Several respected commentators, while pointing out the inconsistencies between the FTLA and §3466, have concluded that it will take congressional action to coordinate the two statutes. See Plumb, "Federal Liens and Priorities -- Agenda for the Next Decade," 77 Yale L.J. 228, 243

B. Perfected and Specific Liens

Plaintiff's second argument is that her lien is excepted from the operation of §3466, since it is a perfected and specific lien. While never yet holding that a perfected and specific lien is excepted from the operation of §3466, the Supreme Court has on several occasions raised the issue only avoid it by holding the asserted lien not sufficiently perfected and specific to qualify under any possible exception. See, e.g., United States v. Gilbert Associates, 345 U.S. 361, 366 (1953); Illinois v. Campbell, 329 U.S. 362, 370-371 (1946); United States v. Waddill Co., 323 U.S. 353, 355-356 (1945); United States v. Texas, 314 U.S. 480, 485 (1941). In any event, the issue is not squarely before the Court since under

(1967); Kennedy, "The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien," 63 Yale L.J. 904, 932 (1954); see also H.B. Agsten & Sons, Inc. v. Huntington Trust & Savings Bank, supra, 388 F.2d at 161 (Haynsworth, C.J., concurring).

federal law[14], it is clear that a lien is sufficiently perfected and specific for purposes of §3466 only if it has been reduced to possession. It is undisputed that plaintiff had not reduced her judgment lien to possession by writ of execution before the Capp property passed to Brann's estate.[15]

It has long been the rule that the federal government is entitled to priority under §3466 over a judgment creditor who has only a general judgment lien upon all of the debtor's real property. See Thelusson v. Smith, 2 Wheat., 396, 15 U.S. 187 (1817). In Thelusson, the Supreme

14. "The effect and operation of a lien in relation to the claim of priority by the United States under Rev. Stat. §3466 is always a federal question. 'The priority given the United States cannot be impaired or superseded by state law.'" Illinois v. Campbell, supra, 329 U.S. at 371 (citation omitted); see also United States v. Waddill Co., supra, 323 U.S. at 356-357.

15. Section 3466 becomes operative upon the passing of the debtor's assets to a third party, here, the executor of Brann's estate.

Court recognized that there must be some exceptions to the priority afforded the federal govenment under §3466 and listed three such exceptions: bona fide conveyances, mortgages, and seizures under a fi. fa. The exceptions listed by the Court all involve situations in which "the property is divested out of the debtor and cannot be made liable to the United States." Id. at 426. Since a general judgment lien does not divest the debtor of his property, the court held that such a lien is not excepted from the operation of §3466. Id. at 425-426.

The Thelusson opinion laid the foundation for the requirement that a lien be reduced to possession in order to be sufficiently perfected and specific for purposes of §3466. This requirement has now been clearly delineated by the Supreme Court in several decisions. See United States v. Gilbert Associates, supra, 345

U.S. at 366 (municipal tax lien for unpaid ad valorem tax); Illinois v. Campbell, supra, 329 U.S. at 376 (statutory lien for state unemployment compensation taxes); United States v. Waddill Co., supra, 323 U.S. at 358 (statutory landlord's lien and municipal tax lien for unpaid personal property taxes). "In claims of this type, 'specificity' requires that the lien be attached to certain property by reducing it to possession, on the theory that the United States has no claim against property no longer in the possession of the debtor." United States v. Gilbert Associates, supra, 345 U.S. at 366.[16]

16. Plaintiff argues that her lien is choate under the standards of United States v. New Britain, 347 U.S. 81 (1954), since "the identity of the lienor, the property subject to the lien, and the amount of the lien are estabished." 347 U.S. at 84. Plaintiff's lien may very well be choate under the standards of New Britain, but it does not necessarily follow that plaintiff's lien is perfected and specific for purposes of §3466. The standards set forth in New Britain, measured the choateness of liens competing with federal tax liens arising under 26 U.S.C. § 6321, and the same standards are not applicable when the government

Plaintiff correctly points out that Thelusson was the last Supreme Court decision dealing with judgment liens. From this, plaintiff argues that since recording acts did not exist at the time of the Thelusson opinion, the Supreme Court would reach a different result today in view of the present-day recording acts. Plaintiff argues that in 1817 a judgment debtor could transfer his property free from any claim of a judgment creditor, whereas today, under §674 of the California Code of Civil Procedure, a judgment debtor cannot transfer title to his property except subject to the claims of a creditor who has recorded his abstract of judgment.

asserts a claim under §3466. United States v. Vermont, 377 U.S. 351, 358 (1964). For purposes of §3466, a lien must not only meet the standards set forth in New Britain (Illinois v. Campbell, supra, 329 U.S. at 375), it must also be reduced to possession (United States v. Gilbert Associates, supra, 345 U.S. at 366). Both requirements must be met before a lien becomes perfected and specific for purposes of §3466. Cf. United States v. Vermont, supra, 377 U.S. at 357-358.

Although plaintiff's historical analysis is correct, it does not follow that her judgment lien should be viewed as perfected and specific for purposes of §3466. "The federal priority is not destroyed by state recording acts any more than by state statutes creating or otherwise affecting liens, if the lien as recorded or otherwise executed does not have the required degree of specificity and perfection. Under the decisions the test is not, and cannot be, simply whether by his taking further steps the lienor's rights will be enforced against others than the Government." Illinois v. Campbell, supra, 329 U.S. at 375.

There is simply no reason to distinguish between a judgment lien and the liens which were before the Supreme Court in United States v. Gilbert Associates, supra, 345 U.S. at 366 (municipal tax lien for unpaid ad valorem tax); Illinois v.

Campbell, supra, 329 U.S. at 376 (statutory lien for state unemployment compensation taxes); or United States v. Waddill Co., supra, 323 U.S. at 358 (statutory landlord's lien and municipal tax lien for unpaid personal property taxes). A judgment lien on all of a debtor's property is no more perfected and specific than a municipal tax lien on all of a debtor's property. See United States v. Gilbert Associates, supra, 345 U.S. at 366.

It is thus clear that a lien, including a judgment lien, will only be excepted from the operation of §3466 if it has been reduced to possession, thereby divesting the judgment debtor of either title or possession. It is not disputed that plaintiff had not executed on her lien before the Capp Street property passed to Brann's estate, notwithstanding the fact that plaintiff had recorded an abstract of judgment. Under California law, "[r]e-

cordation of an abstract of judgment merely creates a lien on real property of the judgment debtor; such recordation is not an execution upon a judgment." Industrial Indemnity Co. v. Levine, 49 CAl.App.3d 698, 699, 122 Cal.Rptr. 712 (1975) (citations omitted). Thus, even if perfected and specific liens are excepted from the operation of §3466, which the Court need not decide, plaintiff's lien, not being sufficiently perfected and specific, does not qualify under such an exception.

IV. ORDER

Accordingly, IT IS HEREBY ORDERED that plaintiff's motion for summary judgment is denied.

IT IS HEREBY FURTHER ORDERED that defendant United States' motion for summary judgment is granted, and judgment shall be entered in favor of defendant United States together with costs of suit incurred herein.

IT IS HEREBY FURTHER ORDERED that counsel for defendant United States shall prepare an appropriate form of judgment in accordance with this Memorandum of Opinion, obtain the approval of all other counsel as to form of judgment, and submit it to the Court for execution within ten (10) days of the date hereof.

Dated: February 1, 1978

/s/
Charles B. Renfrew
United States District Judge

APPENDIX C

Marie D. NESBITT, Plaintiff-Appellant,

v.

UNITED STATES of America, Safeco Title Insurance Company, a California Corporation, the City and County of San Francisco, L.T. Goldmeyer dba Union Credit Company, and the Franchise Tax Board, an agency of the State of California, Defendants-Appellees.

No. 78-2111.

DC# Cv 77-1126 CBR

United States Court of Appeals,
Ninth Circuit.

JUDGMENT

APPEAL from the United States District Court for the NORTHERN District of CALIFORNIA

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the NORTHERN District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed. Costs in ths court in favor of the appellee (USA) and against the aplt.

Costs:

BRIEF FOR THE APPELLEE [USA]	$156.60
TOTAL	**$156.60**

Filed and entered June 26, 1980

APPENDIX D

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARIE D. NESBITT, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, SAFECO TITLE INSURANCE COMPANY, a CALIFORNIA CORPORATION, THE CITY AND COUNTY OF SAN FRANCISCO, L.T. GOLDMEYER DBA UNION CREDIT COMPANY, AND THE FRANCHISE TAX BOARD, AN AGENCY OF THE STATE OF CALIFORNIA, DEFENDANTS- APPELLEES

NO. 78-2111.

ORDER

October 2, 1980.

Before SNEED and POOLE, Circuit Judges, and PFAELZER,* District Judge:

The panel as constituted in the above case has voted to reject the petition for rehearing en banc.

*Honorable Mariana R. Pfaelzer,United States District Judge for the Central District of California, sitting by designation.

The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on the petition. Fed. R. App. P. 35(b).

The petition for rehearing en banc is rejected.

APPENDIX E

Statutes[1]

26 U.S.C. §6321 LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be in a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. §6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the

1. All statutes are shown in their present forms. Where a statute has been amended since petitioner Marie D. Nesbitt recorded an abstract of her judgment with the San Francisco County Recorder on April 28, 1976, the nature of the amendment is fully described in an appropriate footnote.

liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

26 U.S.C. §6323. VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS.

[Sec. 6323(a)]

(a) PURCHASERS, HOLDERS OF SECURITY INTEREST MECHANIC'S LIENORS, AND JUDGMENT LIEN CREDITORS.-- The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice therof which meets the requirements of subsection (f) has been filed by the Secretary.

[Sec. 6323(b)]

(b) PROTECTION FOR CERTAIN INTERESTS EVEN THOUGH NOTICE FILED.-- Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid--

(1) **SECURITIES.**--With respect to a security (as defined in subsection (h)(4))--

(A) as against a purchaser of such security who at the time of purchase did not have actual notice or knowledge of the existence of such lien; and

(B) as against a holder of a security interest in such security who, at the time such interest came into existence, did not have actual notice or knowledge of the existence of such lien.

(2) Motor vehicles.-- With respect to a motor vehicle (as defined in subsection (h)(3)), as against a purchaser of such motor vehicle, if--

(A) at the time of the purchase such purchaser did not have actual notice or knowledge of the existence of such lien, and

(B) before the purchaser ob-

tains such notice or knowledge, he has acquired possession of such motor vehicle and has not thereafter relinquished possession of such motor vehicle to the seller or his agent.

(3) Personal property purchased at retail. -- With respect to tangible personal property purchased at retail, as against a purchaser in the ordinary course of the seller's trade or business, unless at the time of such purchase such purchaser intends such purchase to (or knows such purchase will) hinder, evade, or defeat the collection of any tax under this title.

(4) Personal property purchased in casual sale.-- With respect to household goods, personal effects, or other tangible personal property described in section 6334(a) purchased (not for resale) in a casual sale for less than $250, as against the purchaser, but only

if such purchaser does not have actual notice or knowledge (A) of the existence of such lien, or (B) that this sale is one of a series of sales.

(5) Personal property subject to possessory lien.-- With respect to tangible personal property subject to a lien under local law securing the reasonable price of the repair or improvement of such property, as against a holder of such a lien, if such holder is, and has been, continuously in possession of such property from the time such lien arose.

(6) Real property tax and special assessment liens.-- With respect to real property, as against a holder of a lien upon such property, if such lien is entitled under local law to priority over security interests in such property which are prior in time, and such lien secures payment of--

(A) a tax of general application levied by any taxing authority based upon the value of such property;

(B) a special assessment imposed directly upon such property by any taxing authority, if such assessment is imposed for the purpose of defraying the cost of any public improvement; or

(C) charges for utilities or public services furnished to such property by the United States, a State or political subdivision thereof, or an instrumentality of any one or more of the foregoing.

(7) **Residential property subject to a mechanic's lien for certain repairs and improvements.--** With respect to real property subject to a lien for repair or improvement of a personal residence (containing not more than four dwelling units) occupied by the owner of such residence, as against a mechanic's

lienor, but only if the contract price on the contract with the owner is not more than $1,000.

(8) Attorneys' liens.-- With respect to a judgment or other amount in settlement of a claim or of a cause of action, as against an attorney who, under local law, holds a lien upon or a contract enforcible against such judgment or amount, to the extent of his reasonable compensation for obtaining such judgment or procuring such settlement, except that this paragraph shall not apply to any judgment or amount in settlement of a claim or of a cause of action against the United States to the extent that the United States offsets such judgment or amount against any liability of the taxpayer to the United States.

(9) Certain insurance contracts.-- With respect to a life insur-

ance, endowment, or annuity contract, as against the organization which is the insurer under such contract, at any time--

(A) before such organization had actual knowledge of the existence of such lien;

(B) after such organization had such notice or knowledge, with respect to advances required to be made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge; or

(C) after satisfaction of a levy pursuant to section 6332(b), unless and until the Secretary or his delegate delivers to such organization a notice, executed after the date of such satisfaction, of the existence of such lien.

(10) Passbook loans.-- With repect to a savings deposit, share, or

other account, evidenced by a passbook, with an institution described in section 581 or 591, to the extent of any loan made by such institution without actual notice or knowledge of the existence of such lien, as against such institution, if such loan is secured by such account and if such institution has been continuously in possession of such passbook from the time the loan is made.

(Sec. 6323(c))

(c) PROTECTION FOR CERTAIN COMMERCIAL TRANSACTIONS FINANCING AGREEMENTS, ETC.--

(1) In general.-- To the extent provided in this subsection, even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing but which--

(A) is in qualified property

covered by the terms of a written agreement entered into before tax lien filing and constituting--

(i) a commercial transactions financing agreement,

(ii) a real property construction or improvement financing agreement, or

(iii) an obligatory disbursement agreement, and

(B) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(2) Commercial transactions financing agreement.--For purposes of this subsection--

(A) Definition.-- The term "commercial transactions financing agreement" means an agreement (entered into by a person in the course of his trade or business)--

(i) to make loans to the taxpayer to be secured by commercial financing security acquired by the taxpayer in the ordinary course of his trade or business, or

(ii) to purchase commercial financing security (other than inventory) acquired by the taxpayer in the ordinary course of his trade or business;

but such an agreement shall be treated as coming within the term only to the extent that such loan or purchase is made before the 46th day after the date of tax lien filing or (if earlier) before the lender or purchaser had actual notice or knowledge of such tax lien filing.

(B) Limitation on qualified property.-- The term "qualified property," when used with respect to a commercial transactions financing agreement,

includes only commercial financing security acquired by the taxpayer before the 46th day after the date of tax lien filing.

(C) Commercial financing security defined.--The term "commercial financing security" means (i) paper of a kind ordinarily arising in commercial transactions, (ii) accounts receivable, (iii) mortgages on real property, and (iv) inventory.

(D) Purchaser treated as acquired security interest.--A person who satisfies subparagraph (A) by reason of clause (ii) thereof shall be treated as having acquired a security interest in commercial financing security.

(3) Real property construction or improvement financing agreement.--For purposes of this subsection--

(A) Definition. -- The term "real property construction or improve-

ment financing agreement" means an agreement to make cash disbursements to finance--

(i) the construction or improvement of real property,

(ii) a contract to construct or improve real property, or

(iii) the raising or harvesting of a farm crop or the raising of livestock or other animals.

For purposes of clause (iii), the furnishing of goods and services shall be treated as the disbursement of cash.

(B) Limitation on qualified property).--The term "qualified property," when used with respect to a real property construction or improvement financing agreement, includes only--

(i) in the case of subparagraph (A)(i), the real property

with respect to which the construction or improvement has been or is to be made,

(ii) in the case of subparagraph (A)(ii), the proceeds of the contract described therein, and

(iii) in the case of subparagraph (A)(iii), property subject to the lien imposed by section 6321 at the time of tax lien filing and the crop or the livestock or other animals referred to in subparagraph (A)(iii).

(4) Obligatory disbursement agreement.--For purposes of this subsection--

(A) Definition.-- The term "obligatory disbursement agreement" means an agreement (entered into by a person in the course of his trade or business) to make disbursements, but such an agreement shall be treated as

coming within the term only to the extent of disbursements which a required to be made by reason of the intervention of the rights of a person other than the taxpayer.

(B) Limitation on qualified property.--The term "qualified property," when used with respect to an obligatory disbursement agreement, means property subject to the lien imposed by section 6321 at the time of tax lien filing and (to the extent that the acquisition is directly traceable to the disbursements referred to in subparagraph (A)) property acquired by the taxpayer after tax lien filing.

(C) Special rules for surety agreements.--Where the obligatory disbursement agreement is an agreement ensuring the performance of a contract between the taxpayer and another person--

(i) the term "qualified property" shall be treated as also including the proceeds of the contract the performance of which was ensured, and

(ii) if the contract the performance of which was ensured was a contract to construct or improve real property, to produce goods, or to furnish services, the term "qualified property" shall be treated as also including any tangible personal property used by the taxpayer in the performance of such ensured contract.

(Sec. 6323(d))

(d) 45-DAY PERIOD FOR MAKING DISBURSEMENTS.-- Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing by

reason of disbursements made before the 46th day after the date of tax filing, or (if earlier) before the person making such disbursements had actual notice or knowledge of tax lien filing, but only if such security interest--

(1) is in property (A) subject, at the time of tax lien filing, to the lien imposed by section 6321, and (B) covered by the terms of a written agreement entered into before tax lien filing, and

(2) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(Sec. 6323(e))

(e) PRIORITY OF INTEREST AND EXPENSES.-- If the lien imposed by section 6321 is not valid as against a lien or security interest, the priority of such

lien or security interest shall extend to--

(1) any interest or carrying charges upon the obligation secured,

(2) the reasonable charges and expenses of an indenture trustee or agent holding the security interest for the benefit of the holder of the security interest,

(3) the reasonable expenses, including reasonable compensation for attorneys, actually incurred in collecting or enforcing the obligation secured,

(4) the reasonable costs of insuring, preserving, or repairing the property to which the lien or security interest relates,

(5) the reasonable costs of insuring payment of the obligation secured, and

(6) amounts paid to satisfy any

lien on the property to which the lien or security interest relates, but only if the lien so satisfied is entitled to priority over the lien imposed by section 6321,

to the extent that, under local law, any such item has the same priority as the lien or security interest to which it relates.

(Sec. 6323(f))

(f) PLACE FOR FILING NOTICE; FORM.--

(1) Place for filing.--The notice referred to in subsection (a) shall be filed.--

(A) Under State laws.--

(i) Real property.--In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; and

(ii) Personal property.-- In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; or

(B) With clerk of district court.--In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State has not by law designated one office which meets the requirements of subparagraph (A); or

(C) With Recorder of Deeds of the District of Columbia.--In the office of the Recorder of Deeds of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(2) Situs of property subject to lien.--For purposes of paragraphs (1) and (4), property shall be deemed to be situated--

(A) Real property.--In the case of real property, at its physical location; or

(B) Personal property.--In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed.

For purposes of paragraph (2)(B), the residence of a corporation or partnership shall be deemed to be the place at which the principal executive office of the business is located, and the residence of a taxpayer whose residence is without the United States shall be deemed to be in the District of Columbia.

(3) Form.-- The form and content of the notice referred to in subsection

(a) shall be prescribed by the Secretary. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien.

(4) Indexing required with respect to certain real property.--In the case of real property, if--

(A) under the laws of the State in which the real property is located, a deed is not valid as against a purchaser of the property who (at the time of purchase) does not have actual notice or knowledge of the existence of such deed unless the fact of filing of such deed has been entered and recorded in a public index at the place of filing in such manner that a reasonable inspection of the index will reveal the existence of the deed, and

(B) there is maintained (at the applicable office under paragraph

(1)) an adequate system for the public indexing of Federal tax liens,

then the notice of lien referred to in subsection (a) shall not be treated as meeting the filing requirements under paragraph (1) unless the fact of filing is entered and recorded in the index referred to in subparagraph (B) in such a manner that a reasonable inspection of the index will reveal the existence of the lien.[2]

2. Pub. Law 94-455 (Oct. 4, 1976) added subsection f(4) and amended subsections f(2) and f(3) of 26 U.S.C. §6323. Pub. Law 94-600 (Nov. 6, 1978) amended subsections f(2), f(3) and f(4) of §6323. Prior to the enactment of Pub. Law 94-455 and Pub. Law 94-600, subsections f(2) and f(3) of §6323 read as follows:

"(2) Situs of property subject to lien.-- For purposes of paragraph (1), property shall be deemed to be situated--

(A) Real property.-- In the case of real property, at its physical location; or

(B) Personal property.-- In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed.

* * *3

26 U.S.C.§ 6325(b)(3) SUBSTITUTION OF PROCEEDS OF SALE.--

Subject to such regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to the lien if such part of the property is sold and, pursuant to an agreement with the

For purposes of paragraph (2) (B), the residence of a corporation or partnership shall be deemed to be the place at which the principal executive office of the business is located, and the residence of a taxpayer whose residence is without the United States shall be deemed to be in the District of Columbia.

(3) **Form.--** The form and content of the notice referred to in subsection (a) shall be prescribed by the Secretary or his delegate. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien."

3. Subsections (g), (h) and (i) of 26 U.S.C. §6323 have not been reproduced here. These subsections set forth certain "Refiling" requirements, "Definitions" and "Special rules" respectively.

Secretary or his delegate, the proceeds of such sale are to be held, as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the discharged property.

26 U.S.C. § 7426(a)(3) SUBSTITUTED SALE PROCEEDS.

If property has been sold pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), any person who claims to be legally entitled to all or any part of the amount held as a fund pursuant to such agreement may bring a civil action against the United States in a district court of the United States.

26 U.S.C. § 7426(b)(4) SUBSTITUTED SALE PROCEEDS

If the court determines that a

party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

26 U.S.C. § 7426(c) VALIDITY OF ASSESSMENT.

For purposes of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid.

28 U.S.C. § 1346(2)(e)

The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 or section 7428 (in the case of the United States district court for the District of Columbia) or section 7429

of the Internal Revenue Code of 1954.[4]

31U.S.C § 191. PRIORITY ESTABLISHED

Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. The priority

4. Subsection (2)(e) of 28 U.S.C. §1346 was amended in 1976 by public law 94-455 (October 4, 1976). Prior to the amendment the section read: "The district courts shall have original jurisdiction of any civil action against the United States provided in Section 7426 of the Internal Revenue Code of 1954."

established under this section does not apply, however, in a case under title 11.[5]

CALIFORNIA CODE OF CIVIL PROCEDURE, § 674. (Lien of judgment: Recording abstract: Duration of lien)

(a) An abstract of the judgment or decree of any court of this state, including a judgment entered pursuant to Chapter 1 (commencing with Section 1710.10) of Title 11 of Part 3, or a judgment of any court sitting as a small claims court, or any court of record of the United States, the enforcement of which has not been stayed on appeal or pursuant to Section 1710.50, certified by the clerk, judge or justice of the court where such judgment or decree was rendered, may be recorded with the recorder

5. The last sentence of 31 U.S.C. §191 was added in 1978 by Public Law 95-598, effective Oct. 1, 1979.

of any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterward and before the lien expires, acquire. Such lien continued for 10 years from the date of the entry of the judgment or decree unless the enforcement of the judgment or decree is stayed on appeal or pursuant to Section 1710.50 by the execution of a sufficient undertaking or the deposit in court of the requisite amount of money as provided in this code, or by the statutes of the United States, in which case the lien of the judgment or decree, and any lien or liability now existing or hereafter created by virtue otherwise by statutes of the United States provided, ceases, or upon as undertaking on release of attachment, or unless judgment or decree is previously satis-

fied, or the lien otherwise discharged. The abstract above mentioned shall contain the following: title of the court and cause and number of the action; date of entry of the judgment creditor; amount of the judgment or decree, and where entered in judgment book or minutes. It shall also contain the social security number or driver's license number or both of the judgment debtor if they are known to the judgment creditor, that fact shall be indicated on the abstract of judgment.[6]

(b) ...

(c) ...[7]

6. In 1977 California Code of Civil Procedure §674(a) was amended by substituting the words "or minutes" for "is required, minutes or docket in the justice court" in the third sentence. The fourth and fifth sentences of the subdivison were added by amendment in 1978.

7. Subsections (b) and (c) of section 674 are not reproduced here. These subsections relate to certain liens arising from orders of the juvenile court and certain liens on dwelling houses respectively.

No. A-510

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MARIE D. NESBITT, Petitioner

v.

UNITED STATES OF AMERICA, ET AL., Respondents

Proof of Service

I, Franklin J. Flocks, attorney for petitioner, MARIE D. NESBITT herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22nd day of January, 1981, I deposited in a United States post office, located at Palo Alto, California, with first class postage prepaid, three copies of the foregoing document, in envelopes addressed to each of the parties required to be served in this proceeding. The envelopes were addressed as follows:

Solicitor General, Department of Justice
Washington, D.C. 20530

Thomas Alborg, Esq.
Safeco Title Insurance Co.
417 Montgomery Street
San Francisco, California 94104

William Cirimeli, Esq.
1799 Old Bayshore Highway
Burlingame, California 94010

Thomas M. O'Connor, City Attorney
Virginia J. Lum, Deputy City Attorney
206 City Hall
San Francisco, California 94102

George Deukmejian, Attorney General
Ernest P. Goodman, Assistant Attorney Gener
Timothy G. Laddish, Deputy Attorney General
6000 State Building
San Francisco, California 94102

I further declare that on said date I deposited one additional "courtesy" copy of the foregoing document in a United States post office at Palo Alto, California, with first class postage prepaid in an envelope addressed as follows:

Joan Oppenheimer, Esq.
United States Department of Justice
Tax Division
Appellate Section
10th & Pennsylvania
Washington, D.C. 20530

Dated: January 22, 1981

/s/
Franklin J. Flocks

No. 80-1256

FILED
APR 17 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

MARIE D. NESBITT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN F. MURRAY
Acting Assistant Attorney General

WILLIAM S. ESTABROOK
JOAN I. OPPENHEIMER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the priority under Section 3466 of the Revised Statutes for "the debts due to the United States" from an insolvent person defeats the lien of a judgment creditor under 26 U.S.C. 6323(a), as amended by the Federal Tax Lien Act of 1966, where the judgment lien was filed prior to the federal tax lien and the insolvency of the debtor, but the judgment creditor failed to enforce her lien by execution.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1256

MARIE D. NESBITT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 4A-34A) is reported at 445 F. Supp. 824. The opinion of the court of appeals (Pet. App. 1A-3A) is reported at 622 F. 2d 433.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1980 (Pet. App. 35A-36A), and a petition for rehearing was denied on October 2, 1980 (Pet. App. 37A-38A). By order dated December 15, 1980, Mr. Justice Rehnquist extended the period in which to file a petition for a writ of certiorari to January 23, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Rev. Stat. 3466, 31 U.S.C. 191 and Section 6323(a) of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth at Pet. App. 39A-66A.

STATEMENT

The question presented in this federal income tax collection case involves the resolution of the competing claims of petitioner, a judgment creditor, and the United States, against the net proceeds of the sale of real property of an insolvent debtor.

The pertinent facts are undisputed and may be summarized as follows: The United States assessed tax liabilities against the debtor, Franklyn K. Brann, who died on May 26, 1976, in the amount of $89,160.06 for income taxes for 1974, 1975, and 1976, and for withholding and F.I.C.A. taxes for the taxable periods ending December 31, 1974, March 31, 1975, June 30, 1975, September 30, 1975, March 31, 1976, and June 30, 1976 (R. 28-30).[1] On September 7, 1976, January 17 and 25, 1977, the Internal Revenue Service filed notices of tax liens in the aggregate amount of $55,872.72. Petitioner holds a default judgment against Brann in the amount of $225,061 which she recorded on April 28, 1976. However, petitioner never executed on her judgment (Pet. App. 6A-7A, 27A).

At the time of his death, the debtor Brann and his wife owned an individual 13% interest in real property. That interest was sold pursuant to agreement of the parties, and the proceeds are being held for distribution as determined in this proceeding. It is agreed that the decedent's estate is insolvent, *i.e.*, "insufficient to pay all the debts due from the deceased" within the meaning of Rev. Stat. 3466, 31 U.S.C. 191 (Pet. App. 6A-9A, 11A).

Petitioner brought this action in the United States District Court for the Northern District of California seeking a determination that her claims as a judgment creditor under 26 U.S.C. 6323(a) to certain proceeds from the sale of the debtor's real property had priority over the tax claims of the

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[1] "R." refers to the record in the court of appeals.

United States under Rev. Stat. 3466, 31 U.S.C. 191. The district court upheld the priority of the government's tax claim. After reviewing the authorities, it concluded that "a lien, including a judgment lien, will only be excepted from the operation of §3466 if it has been reduced to possession, thereby divesting the judgment debtor of either title or possession" (Pet. App. 32A). Even on the assumption that perfected and specific liens are excepted from the rule of absolute priority established by Section 3466 (a question the district court declined to address), the court concluded that "[petitioner's] lien, not being sufficiently perfected and specific, does not qualify under such an exception" (Pet. App. 33A). The court of appeals affirmed for the reasons stated in the district court's opinion (Pet. App. 1A-3A).

ARGUMENT

The decision below correctly held that the government's tax claim under Section 3466 of the Revised Statutes against an insolvent estate had priority over petitioner's unperfected judgment lien.

1. Section 3466 of the Revised Statutes, 31 U.S.C. 191, provides in pertinent part that "[w]henever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied * * *."

The statute has its roots in the early enactments of the Republic, *i.e.*, the Act of Congress of Mar. 3, 1797, ch. 20, Section 5, 1 Stat. 515. By its broad terms, it admits of no exceptions in conferring absolute priority for debts due the United States from an insolvent person or estate. *United States* v. *Vermont*, 377 U.S. 351, 357 (1964). As the Court recently affirmed, " '[o]nly the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of §3466.' " *United States* v.

Moore, 423 U.S. 77, 82-83 (1975), quoting from *United States* v. *Emory*, 314 U.S. 423, 433 (1941). Accordingly, if the insolvent debtor is in possession of property, the priority of Section 3466 defeats unexecuted judgment liens. As the Court held more than 150 years ago in *Thelusson* v. *Smith*, 15 U.S. (2 Wheat.) 396, 426 (1817), "the general lien of a judgment upon the lands of an insolvent debtor is subordinate to the preference established by the statute unless seizure by a marshal or some other equivalent act has made the lien specific and brought about a change of title or possession." *New York* v. *Maclay*, 288 U.S. 290, 293-294 (1933).

Moreover, Section 3466 applies to all the insolvent's debts to the government, whether or not arising from taxes, and whether or not secured by a lien. In *United States* v. *Gilbert Associates*, 345 U.S. 361, 366 (1953), the Court accorded priority under the statute to subsequently arising claims of the United States against an insolvent debtor even though the identity of a prior existing lienor, the amount of the lien, and the property subject to the lien were all clearly established. As the Court observed, "[i]n claims of this type, 'specificity' requires that the lien be attached to certain property by reducing it to possession, on the theory that the United States has no claim against property no longer in the possession of the debtor * * *. The taxpayer has not been divested by the Town of either title or possession. The Town, therefore, had only a general, unperfected lien" (*id.* at 366). Here, too, petitioner's competing lien did not reduce the debtor's property to her possession. The court of appeals therefore correctly concluded that petitioner's lien was "not sufficiently perfected and specific to come within any such exception [to Section 3466]" (Pet. App. 3A).

2. Petitioner's claim to priority for her unperfected judgment lien rests upon Section 6323(a) of the Internal Revenue Code of 1954 (26 U.S.C.), as amended by the

Federal Tax Lien Act of 1966. That statute provides that federal tax liens "shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary." Since petitioner's judgment lien was recorded prior to the filing of the federal tax lien of the United States, she claims priority under Section 6323. In petitioner's view, that provision overrides the rule of absolute priority in favor of the government provided by Section 3466 of the Revised Statutes. In support of this argument, petitioner cites this Court's decision in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979).

But Section 6323 has no application to a case where, as here, the debtor is insolvent and the government's claim derives from Section 3466 of the Revised Statutes. Petitioner's claim under Section 6323 would be accorded priority if the government's claim derived from an after-arising tax lien. As this Court stated in *United States* v. *Vermont, supra*, 377 U.S. at 358, it is "quite clear that different standards apply where the United States' claim is based on a tax lien arising under §§6321 and 6322 (footnote omitted)." See also *United States* v. *New Britain*, 347 U.S. 81 (1954).

Nor does *United States* v. *Kimbell Foods, Inc., supra*, require a different result. There, the Court held that in the absence of a federal statute setting priorities, a uniform national rule was unnecessary to protect the federal interests underlying federal loan programs with respect to the question whether contractual liens arising from the loan programs take precedence over private liens. The Court accordingly adopted state law as the appropriate federal rule for establishing the relative priority of these competing federal and private liens. Here, on the other hand, Congress has long evidenced its intention in Section 3466 to establish a uniform national rule of absolute priority in favor of the

federal government for its claims against insolvent debtors. *Kimbell Foods, Inc.* therefore has no application to this case.

There is, moreover, no basis for petitioner's suggestion (Pet. 27-30) that Congress intended to modify Section 3466 by the amendments to Section 6323 of the Code contained in Section 101(a) of the Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125. Section 3186 of the Revised Statutes, the antecedent of Section 6323(a), was amended by the Act of Mar. 4, 1913, ch. 166, 37 Stat. 1016, to accord a mortgagee, purchaser, or judgment creditor priority over a federal tax lien. However, nothing in the underlying legislative history of that enactment or of the 1966 legislation diminishes the Section 3466 priority of the United States in insolvency. H.R. Rep. No. 1018, 62d Cong., 2d Sess. (1912); H.R. Rep. No. 1884, 89th Cong., 2d Sess. (1966); S. Rep. No. 1708, 89th Cong., 2d Sess. (1966).

Indeed, Congress has refused to enact proposals which would have explicitly narrowed the sweep of Section 3466 in the circumstances of this case. For example, in 1959, the American Bar Association proposed a modification of Section 3466 to protect the validity of a "lien or security interest which would have been entitled to priority over the claim of the United States immediately preceding such divestment [of title or possession]" (ABA, *Final Report of the Committee on Federal Liens* 122 (1959) *reprinted in Priority of Federal Tax Liens and Levies: Hearings on H.R. 11256 and H.R. 11290 Before the House Comm. on Ways and Means*, 89th Cong., 2d Sess. 197 (1966) (hereinafter cited as "*House Hearings*")). Although a bill to this effect was introduced in the 86th Congress, it was not reported out of committee. See 105 Cong. Rec. 1030, 1258 (Index) (1959). Moreover, this proposal was again presented to Congress during its consideration of the Federal Tax Lien Act of 1966 (see

House Hearings, supra, at 75-88, 196-201). Neither Section 3466 nor Section 6323 of the Code was so altered.[2] In light of the statement in the American Bar Association's Report that the proposed provision "would assure, contrary to the suggestions made in some decisions, that any lien which would qualify for priority in the absence of insolvency would continue to enjoy such priority" (see *House Hearings, supra*, at 199), Congress' refusal to adopt the ABA proposal lends further support to the correctness of the decision below.

3. Contrary to petitioner's final argument (Pet. 17-20), there is no present conflict of decisions with respect to the question presented requiring resolution by this Court. In *Sapero* v. *O'Connell*, No. 799 (Mar. 13, 1981), the Maryland Court of Special Appeals recently concluded, in conformity with the decision below, that the priority in favor of the United States under Section 3466 was unaffected by those provisions governing unexecuted judgment lien creditors under Section 6323(a), as amended by the Federal Tax Lien Act of 1966. Accord: *H.B. Agsten & Sons, Inc.* v. *Huntington Trust & Savings Bank*, 388 F. 2d 156, 160 (4th Cir. 1967) (Haynsworth, J., concurring). Although the decisions are not uniform under the pre-1966 law,[3] no appellate

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[2]A revised version of the American Bar Association's insolvency priority recommendation was before the Senate Judiciary Committee in 1971 as S. 2197, 92d Cong., 1st Sess. This bill likewise was not reported out of committee. See 117 Cong. Rec. 1650 (Index) (1971).

[3]See *Commonwealth of Kentucky, Department of Revenue* v. *United States*, 383 F. 2d 13 (6th Cir. 1967) (government's priority under Section 3466 defeats judgment lien creditor). Contra: *National Surety Corp.* v. *Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952); *United States* v. *South Carolina*, 227 S.C. 187, 87 S.E.2d 577 (1955).

Despite some language at odds with the analysis of the court below in this case, the other cases upon which petitioner relies (Pet. 19-20) are distinguishable. In *In re Decker's Estate*, 355 Pa. 331, 49 A.2d 714

court has upheld petitioner's contention that an unperfected prior judgment lien arising under the Federal Tax Lien Act of 1966 defeats the absolute priority of the United States under Section 3466 of the Revised Statutes.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN F. MURRAY
Acting Assistant Attorney General

WILLIAM S. ESTABROOK
JOAN I. OPPENHEIMER
Attorneys

APRIL 1981

(1946), cert. denied, 331 U.S. 807 (1947), the competing claimants were pledgees who, prior to the insolvency, *possessed* the stock which was the subject of the controversy. *Exchange Bank & Trust Co.* v. *Tubbs Mfg. Co.*, 246 F. 2d 141 (5th Cir.), cert. denied, 355 U.S. 868 (1957), concerned the competing interests of the government and mortgagees. In both *Decker's Estate* and *Exchange Bank* the competing claimants arguably had attained the requisite "title or possession." See *New York* v. *Maclay*, *supra*, 288 U.S. at 293-294.

[4]In *In re Estate of Adolph P. Berretta*, Nos. 11, 22, (Mar. 13, 1981), the Supreme Court of Pennsylvania affirmed by an equally divided court a decision in favor of a prior judgment lienor over a claim of the United States under Section 3466. This decision, however, has no binding precedential value as a ruling on the merits. See *Commonwealth* v. *Rightnour*, 469 Pa. 107, 364 A.2d 927 (1976); *Commonwealth* v. *Covil*, 474 Pa. 375, 378 A.2d 841 (1977); *Commonwealth* v. *Davenport*, 462 Pa. 543, 559 n.3, 342 A.2d 67, 75 n.3 (1975).

No. 80-1256

In the Supreme Court of the United States

OCTOBER TERM, 1980

MARIE D. NESBITT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANKLIN J. FLOCKS
Attorney at Law
260 Sheridan Avenue, Suite 414
Palo Alto, California 94306

Telephone: (415) 326-6625

Attorney for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

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REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
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ARGUMENT

I. The decisions of the Ninth and Sixth Circuits are in conflict with the decisions of the Supreme Courts of Pennsylvania, North Carolina and South Carolina, the Appellate Department of the Superior Court of New Jersey, the U.S. District Court for the District of South Dakota, and language of decisions of the Fifth and Second Circuits.

A. Pennsylvania

After the Petition for a Writ of Certiorari was filed in the present case, the Supreme Court of Pennsylvania in a 3-3 split decision affirmed a decree of the Orphan's Court holding that a judgment

lien on real property of an insolvent decedent took priority over a later recorded Federal tax lien. In RE: Estate of Adolph P. Berretta, Nos. 11 and 22; (Jan. Term 1979), _Pa._, _A.2d _, (Mar. 13, 1981)[1].

In its Brief in Opposition (hereinafter "Br.") the government correctly points out that the decision in Berretta technically has no "binding precedential value" since it was decided by an evenly divided court. (Br.8, n.4). However, the effect of Berretta is to leave intact the earlier decisions of the Pennyslyvania Supreme Court and the Pennsylvania Superior Court which squarely held that the Federal Tax Lien Act impliedly limits

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1. As of the date that preparation of this brief was completed, the Official and National Reporter citations to In RE: Estate of Adolph P. Berretta were not yet available. Typewritten copies of the 24-page Opinion in Support of Affirmance and the 7-page Opinion in Support of Reversal may be obtained from the Pennsylvania Supreme Court, Room 456, City Hall, Philadelphia, Pennsylvania 19107.

the scope of the Insolvency Priority-Statute [See In Re Decker's Estate, 355 Pa. 331; 49 A.2d 714 (1946) cert. denied, sub. nom. Decker v. Kann, 331 U.S. 807 (1947) and Meyer Estate 159 Pa. Super. 296, 48 A.2d 210 (1946)]. The government having just lost a major case in the Pennsylvania Supreme Court, cannot now claim that it is in a better position to oppose our Petition for a Writ of Certiorari than it was before the decision in Berretta was announced.

B. North Carolina and South Carolina

The government admits that the decisions of the Supreme Courts of North Carolina and South Carolina[2] are in conflict with the Decisions of the Ninth and Sixth Circuits.[3] (Br.7, n.3). However the

2. See United States v. South Carolina, 227 S.C. 187, 87 S.E.2d 577, 581 (1955) and National Surety Corp. v. Sharpe, 236 N.C. 35, 72 S. E.2d 109 (1952)

3. See Nesbitt v. United States, 622 F2d 433 (9th Cir. 1980) and Commonwealth of Kentucky, Department of Revenue v. United States 383 F.2d 13 (6th Cir. 1967)

government argues that these cases are not significant because they were decided prior to the 1966 amendments to the Federal Tax Lien Act (Br. 7). Judgment lien creditors such as NESBITT have been expressly protected from later recorded tax liens of the Federal government ever since the Federal Tax Lien Act was first amended in 1913. (Act of Mar. 4, 1913. Ch. 166, 37 Stat. 1016). The only thing that the 1966 Amendment to the Tax Lien Act did was to expand the rights of private creditors. Accordingly, the fact that these decisions were decided prior to 1966 is of no significance

C. North Dakota and New Jersey

In her Petition filed on January 23, 1981, NESBITT pointed out that the Decision of the Ninth Circuit was inconsistent with Decisions of the Appellate Department of the Superior Court of New Jersey and the U.S. District Court for the

District of South Dakota (Pet. 17-19)[4]. The government's Brief fails to discuss either of these cases.

D. Fifth and Second Circuits

In her Petition NESBITT pointed out that language of the Fifth Circuit in the recent decision of United States v. S.K.A. Associates, Inc., 600 F.2d 513 (5th Cir. 1979) makes it clear that the 5th Circuit is of the opinion that the Insolvency-Priority Statue gives the government no greater priority than it would enjoy under State Commercial Law. (Pet. 20 n. 21) The government's brief fails to discuss this case.

In her Petition NESBITT pointed out that language of the Second Circuit in

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4. City of Vermillion v. Stan Houston Equipment Co., 341 F.Supp. 707, 713 (S.D.S.D. (1972) and James Talcott v. Roto American Corporation, 123 N.J. Super.183, 302 A.2d 147, 151 (1973). The citation to Talcott was inadvertently omitted from Footnote 20 of the petition. However, the case is well-known to the government having been cited by the District Court at Pet. App. 15A (n.9).

United States v. Vermont 317 F2d 446, 449 n.3 (1963), aff'd 377 U.S. 351 (1964) clearly shows that the Second Circuit is of the opinion that the Federal Tax Lien Act impliedly limits the scope of the Insolvency-Priority Statute. (Pet. 20-21, n.21). The government's brief fails to discuss the opinion of the Second Circuit in United States v. Vermont.

II. The decision below conflicts with controlling principles announced in the decisions of this court.

In her Petition NESBITT pointed out that the decision of the Ninth Circuit was inconsistent with the plain language of decisions of this court announced in United States v. Kimball Foods, Inc., 440 U.S. 715 (1979), and its companion case, United States v. Crittenden, 440 U.S. 715, 723 (1979). The government would have this court believe that Kimball should be limited to its facts so that it applies

only when the private creditor is solvent and has enough money to pay all of his creditors.(Br.5-6). We submit that such a narrow interpretation is not warranted.

III. The fact that congress has not enacted proposed legislation which would have expressly stated that the Insolvency-Priority Statute has no application to a creditor who is expressly protected from claims of the government under the tax lien act is of no significance.-- Such a statute would have merely been declarative of existing law.

We acknowledge that buried in the hundreds of pages of legislative history of the 1966 Amendments to the Federal Tax Lien Act is a proposal which would, if it had been enacted, have clarified that the Insolvency-Priority Statute is not applicable to a private creditor who is expressly protected from the claims of the government under the terms of the Federal Tax Lien Act. The opinion of the District Court makes it clear that this legislation was not enacted because of some dissatisfaction with it on the part

of congress. Rather congress "failed to act on the ABA's proposal...apparently because the ABA's recommendation affected many federal claims in addition to tax claims and, therefore, fell outside the jurisdiction of the congressional committees that considered the ABA's proposed tax lien legislation." (Pet. App. 19A-20A). The ABA has stated that one of the purposes of its proposed legislation was to "provide (and partly to clarify) that the priority conferred by (section 3466) is inapplicable as against competing liens." ABA Journal, October, 1970, Volume 56, p. 991 (Emphasis added.) It must be remembered that at the time the 1966 amendment to the Federal Tax Lien Act was enacted, the idea that the government might be able to use its priority under §3466 to defeat the claim of a private creditor whose lien was superior to that of the government under the terms of the Tax Lien Act was very novel. The govern-

ment had made this argument in court on several occasions but it had lost every case. All of the cases that the government has won on this precise issue were decided after 1966. The 1966 congress had many important tasks besides "clarifying" the meaning of an almost two-hundred year old statute which had never been interpreted in the manner that the Ninth Circuit has now interpreted it. The legislative history of the 1966 Amendment to the Tax Lien Act is exhaustively set forth in the 784-page Legislative History of the Federal Tax Lien Act of 1966, 89th Cong., 2d Session, by the Committee on Ways and Means of the House of Representatives. This document contains not one word which would suggest that anyone even hinted to the Congress that the government planned to use its priority under §3466 to attempt to defeat the liens of persons expressly protected from claims of the government by §6323. In the course of its hearings,

Laurens Williams, Chairman of the Special Committee on Federal Tax Liens of the American Bar Association, addressed the House Committee on Ways and Means. Despite the fact that the American Bar Association had earlier proposed legislation which would have completely rewritten §3466, Mr. Williams expressed great satisfaction with the bill as written. There is nothing in Mr. Williams' remarks which would suggest that he believed it necessary to amend §3466 in order to protect persons expressly protected from the claims of the government by §6323. Legislative History of the Federal Tax Lien Act of 1966, supra, at pp. 104-117.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

April 27, 1981

/s/
Franklin J. Flocks
Attorney for Petitioner

No. 80-1256

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MARIE D. NESBITT, Petitioner

v.

UNITED STATES OF AMERICA, ET AL., Respondents

Proof of Service

I, Franklin J. Flocks, attorney for petitioner, MARIE D. NESBITT herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of April, 1981, I deposited in a United States post office, located at Palo Alto, California, with first class postage prepaid, three copies of the foregoing document, in envelopes addressed to each of the parties required to be served in this proceeding. The envelopes were addressed as follows:

Solicitor General, Department of Justice
Washington, D.C. 20530

Thomas Alborg, Esq.
Safeco Title Insurance Co.
417 Montgomery Street
San Francisco, California 94104

William Cirimeli, Esq.
500 Airport Boulevard, Suite 352
Burlingame, California 94010

Thomas M. O'Connor, City Attorney
Virginia J. Lum, Deputy City Attorney
206 City Hall
San Francisco, California 94102

George Deukmejian, Attorney General
Ernest P. Goodman, Assistant Attorney General
Timothy G. Laddish, Deputy Attorney General
6000 State Building
San Francisco, California 94102

Dated: April 27, 1981

/s/
Franklin J. Flocks